This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

2017a-6

AV
ABR
XYZ

TWO READINGS

DELIVERED

IN

THE MIDDLE TEMPLE HALL.

BY

GEORGE BOWYER, Esq., D.C.L.,
BARRISTER-AT-LAW,
Author of "Commentaries on the Constitutional Law of England," and "On the Modern Civil Law," &c.

LONDON:
V. & R. STEVENS AND G. S. NORTON,
Law Booksellers and Publishers,
(*Successors to the late J. & W. T. CLARKE, of Portugal Street,*)
26, BELL YARD, LINCOLN'S INN.

MDCCCL.
1850.

LONDON:
STEVENS AND CO., PRINTERS, BELL YARD,
TEMPLE BAR.

Middle Temple.

WO READINGS.

BY

GEORGE BOWYER, ESQ., D.C.L.

FIRST READING.

ON THE USES OF THE SCIENCE OF GENERAL JURISPRUDENCE, AND THE CLASSIFICATION OF LAWS.

I CANNOT perhaps more conveniently commence the performance of the duties which our learned Benchers have been pleased to intrust to me, than by stating my views of the principles by which those duties should be regulated. I shall thereby show what use may be derived from my labours, and at the same time lay down a plan of my future course.

On the abstract question of the utility of lectures I shall say nothing, but I shall proceed to describe the nature of the Readings, which are, in my opinion, required of me.

I might content myself with presenting to you mere explanatory treatises on different branches of our laws by a compilation of cases and other authorities. But, however useful that course may be, I think that something more may be reasonably expected of me. The digests and text books which are accessible to every student seem, indeed,

to render Readings of that simple description far less requisite than they used to be before Blackstone set the example of bringing the law into a perspicuous and even an elegant form. And I do not suppose that readings or lectures can be made a substitute for the private and diligent study of those books.

It will, therefore, be my endeavour to give information which is not immediately within your reach, and to show how that information may facilitate or render more valuable the knowledge acquired in the ordinary course of legal training and practice. That this *can* be done I have no doubt. Whether *I* can do it time will show. I can only say that no endeavour shall be wanting on my part.

Some of the most distinguished men of our profession have long felt that the sphere of legal learning in England ought to be enlarged. It is indeed obvious that when other sciences are being augmented with the genius, the industry, the enterprise, the invention, and the intellectual fertility—not of one country, but of the whole civilized world—the science of law must fall below her high dignity if she be confined within the mere bounds of the practical daily necessities of the administration of justice. No human science is more noble, none more deserving of the widest and most liberal cultivation, without which its pro-

fessors will hardly preserve their proper rank with regard to those of other sciences. Without this broad cultivation Municipal Law will become steril and less able than it ought to be to meet all the exigences which changes both social and political and the progress of mankind must engender.

This is no doubt a topic of great practical importance in our days, when—partly from the natural course of the human mind, and partly from the great events which have lately agitated and convulsed the larger part of the civilized world—every institution of the country is narrowly scrutinized—every law is critically examined,—and a strong feeling has been awakened that improvement is requisite in many parts of our Municipal Law.

How are we to meet these exigences? How are we to defend those laws which ought to be maintained, and usefully reform those which require improvement? The country will not be satisfied with appeals to mere precedent, or the established rules of positive law. We must be ready to give reasons for the law, drawn from sound practical philosophy, convincing to the minds of acute, practical, and judicious men. We must appeal to principles of justice and public utility. And where the law requires amendment, it must be reformed on some broad and sound principles, which can be done only by the light and guidance

of the science of jurisprudence. That science is the necessary guide of the legislator in the performance of his duty, because it suggests remedies for defects or omissions of the Municipal Law; and, by presenting a general and coherent system to his mind, it enables him to preserve a unity in his work, without which it must be a sort of patchwork and a series of experiments.

In the administration of justice, by the combined services of the Bench and the Bar, we cannot fail to see the value of a broad cultivation of the science of jurisprudence. Cases frequently occur in our Courts, for the decision of which the precedents and books of authority afford insufficient or no rules. In such cases,—as the judges are always desirous of following the dictates of reason and substantial justice,—it must be a great advantage to an advocate to have at his disposal the vast mine of equitable principles and legal reasoning to be found in the Roman Law and the writings of the jurists. And the science of jurisprudence must be most valuable to a judge, where he finds himself forsaken, or imperfectly assisted, by the guides on whom he is accustomed to rely.

One instance of a case of this description will suffice, though many might be cited: and, indeed, it might be shown that the difficulties attending the settlement of the rights and liabilities of share-

holders and provisional committeemen would have been diminished by the assistance of the great civilians and jurists. I refer to the case of *Hammond* v. *Hall*, 10 Sim. 551.

The question raised in that case, on motion to dissolve an injunction, was, Whether the owner of an old well can prevent his neighbour from sinking a well on his own land, on the ground that thereby the supply of water to the old well will be drawn off or diminished. The case was argued by counsel of the greatest eminence; and I perfectly remember that there was a paucity of English authorities on the question in dispute. But there are principles in the Roman Civil Law (in the titles on the Aquilian Law, and De Regulis Juris), and in Grotius, b. ii., chaps. iii. and viii., which afford a solution of the difficulty most reasonable and just. And the reason of the law on the point is given very concisely by Ulpian, in the 26th Law of the title of the Pandects, "De Damno Infecto." He says, "Proculus ait cum quis jure quid in suo faceret, quamvis promisisset damni infecti vicino, non tamen eum teneri ea stipulatione." And he gives as an instance the case of a man who prevents water from flowing from his land to that of his neighbour. The meaning of the passage is that, though a man be bound by the stipulation *damni infecti*,—that is to say, not to do anything to injure his

neighbour's property,—yet he is not restrained from doing any lawful act incident to the enjoyment of his own property. And the very point in question, in the case of *Hammond* v. *Hall*, is decided accordingly by Ulpian, in the 1st Law, of the title of the Pandects, "De Aqua et Aquæ Pluviæ Arcenda." He says, "*Denique Marcellus scribit, cum eo qui in suo fodiens, vicini fontem avertit nihil posse agi.*" And, in the case of *Acton* v. *Blundel*, 12 M. & W. 353, the same doctrine was laid down in a similar case; and both the learned counsel at the bar, and the Lord Chief Justice Tindal, made great use of texts of the Civil Law and the writings of the commentators.

Here we have a practical instance of the use of looking for legal knowledge beyond our own books. In doubtful cases the judges are glad to be furnished by counsel with this species of learning. And in all cases where the Court is not absolutely bound by authorities, but is required to exercise a more or less extended judgment, a knowledge of the science of jurisprudence must be very valuable to show what may be the effects of laying down a particular doctrine, and how it will work with the system of the branch of law to which it belongs.

Lord Mansfield, that great master of jurisprudence, was the principal founder of our Commercial Law—and especially of our Law of Insurance, and

it is easy to perceive that his decisions were framed with reference to a system of jurisprudence, and not merely on consideration of the particular case.

Some even of our greatest judges have, perhaps, shown in their decisions the defects of the exclusive nature of English legal education, which has until lately been too much confined to the study of our own Municipal Law. An instance of this is to be found in the case of *Le Neve* v. *Le Neve*, 1 Ves. 64; where Lord Hardwicke held, that if a deed respecting lands in any of the register counties is not registered, and afterwards the same lands are sold or mortgaged by a deed properly registered; if the person claiming under the second deed has notice of the first deed, the person claiming under the first deed, though it is not registered, shall be preferred to him. Mr. Butler in one of his notes to Co. Litt. observes upon this case, that it is founded on principles both just and equitable, but that it may be doubted whether a more rigid adherence to the letter of the statutes would not have been more beneficial to the public. He adds, that the French showed a much more rigid and pertinacious adherence to the letter of their laws respecting the registration of deeds and wills. And the learned writer relates that several laws respecting substitutions being unsettled, and the laws respecting them being different in different parts of the kingdom,

they were all reduced into one law by the celebrated Ordonnance of August, 1747. That ordonnance was framed by the Chancellor d'Aguesseau, after taking the sentiments of every parliament in the kingdom upon forty-five different questions proposed to them upon the subject. The 39th question is—whether a creditor or purchaser having notice of the substitution before his contract or purchase is to be admitted to plead the want of registration of the deed creating the substitution. All the parliaments except the parliament of Flanders agreed that he was; that to admit a contrary doctrine would make it always open to argument whether the party had or had not notice of the substitution; that this would lead to endless uncertainty, confusion, and perjury; and that it was better that the right of the subject should depend on certain and fixed principles of law, than upon rules and constructions of equity, which must be arbitrary and, consequently, uncertain. The Ordonnance of August, 1747, was framed accordingly. And the same principle of law is embodied in the Code Napoleon, Art. 1071.

The Real Property Commissioners, and the Committee of the House of Commons, on the bill to erect a general registry of deeds, concurred in the views of the Chancellor d'Aguesseau; and it may be doubted whether the establishment of the doc-

trine in *Le Neve* v. *Le Neve* has not, by letting in the doctrine of notice, very materially defeated the objects of the Registration Acts.

With all respect for the truly illustrious name of Lord Hardwicke, it will probably be admitted that he took a more confined view of the matter in question than the Chancellor d'Aguesseau and the parliaments of France, and decided rather with reference to the particular case than on the broad principles of jurisprudence, for a masterly knowledge of which the French Chancellor is celebrated, and perhaps unrivalled.

These reflections will probably suffice to suggest the importance of looking beyond our own reports and text books for legal knowledge, and extending the sphere of that knowledge—as much as our opportunities and our leisure will permit. I say it with this qualification because it is our *first duty* to learn *our own* national law. But we must not neglect whatever may be useful to extend and improve our law, and enable us to perform in the most perfect manner the duties which the constitution of our country has allotted to us or may hereafter assign to us. More and more will be required of us as time rolls on, and the improvement of the country in learning and intelligence progressively increases; and we must therefore endeavour, by extending the sphere of our studies, to qualify our-

selves for the greater services which will be required of us.

This is a topic especially important to the students and other junior members of the legal profession, who will probably find their lot cast in times when men will be less willing to be satisfied with the beaten track of mere legal routine and precedent than they are at present,—and when the judges and the legislature will expect of them what will scarcely be expected of their seniors.

We sometimes hear persons of learning and experience ask why students should be called upon to submit to studies which they in their studentship were exempt from. The question would be unanswerable if time produced no changes in the wants of human society. But every year that passes teaches us the contrary, and teaches us that we must not remain stationary.

Again we sometimes hear persons of mature age say—Are we to go to school, and is our learning to be neglected which we have accumulated with great labour, and in many years? This sort of jealousy is natural, but unfounded. Their learning and experience can never become neglected among a practical and thoughtful people. Even the obsolete portions of their learning have value as part of the legal history of the country—as part of the chain which connects the past with the present.

And their experience is necessary for the good government of the realm,—and the more inestimable because, like a great forest tree, it can be produced only by the lapse of many years. Without experience indeed nothing can be safely done in the government of mankind. The instability of laws and institutions of some other countries affords us a useful lesson, showing that whatever is not grounded on the past history of a nation, and does not arise out of it by a process of development, cannot take any deep roots. It is by the conjunction of experience and mature learning acquired in a long course of years, with the improvements which the spirit of our times suggests, that the welfare and greatness of the country can best be promoted.

In order to explain how the scope of legal studies may be most usefully enlarged, it is now necessary to lay before you a plan of the whole science of law. This process will show you our Municipal Law as a part of a great moral science, and thence the connection of every branch of that science with our law, and the uses of that connection, will appear.

It is unnecessary to define law, for this has been done by Blackstone,* with whose masterly explanation of its nature you are all familiar. We will proceed therefore at once to natural law—or the law

* Blackst. Comm. book i. Introd. § 2.

of nature, which is the basis of every branch of law.

It is defined by Grotius,* to consist in certain principles of right reason, which enable us to know that a certain action is right or wrong, according to its congruity or incongruity with the reasonable and social nature of man, and, consequently, that God, who is the Author of nature, commands or forbids that action.

Some writers have treated this law as mere matter of opinion, and so vague and uncertain that it does not deserve the name of law. But they have been abundantly refuted by Grotius, in the preliminary discourse to his great work: and it is indeed absurd to say that, whereas the Creator gave us reason and a sense of right and wrong, requiring of us the performance of certain duties to himself and to man,—we are unable to perceive those duties by the use of our reason. We must therefore assume, as demonstrated, that there are such duties, and that by the use of our reason we can discover them; and this natural law is expressly recognised by Scripture, for St. Paul says—that "when the Gentiles, who have not the [moral revealed] law, do by nature the things contained in the law, they are a law to themselves:" and he continues—"Which show the work of the law written on their hearts,

* Grot. Droit de la G., liv. i., ch. i., § 10.

their conscience also bearing witness, and their thoughts in the mean time accusing or else excusing one another"—Rom. ii. 14, 15.

The law of nature is to be deduced from the natural state of man, which is not (as some writers have supposed) that of a savage in the woods, or a sort of wild animal in human form (a condition in which man never existed, except when accidentally degraded below his nature), but that state which the reasonableness of man and the dignity of his immortal soul point out as the state for which he was intended by his Creator. Hence it is that from Natural Law, as we see it laid down in the Pandects by Hermogenianus,* civil society and all its institutions and contracts, calculated for the welfare and improvement of mankind, are derived either directly or indirectly. And on the same principles the great French civilian Domat has elaborately deduced all laws from the two fundamental rules of Natural Law, confirmed by express revelation,—namely, love of God and love of our neighbour. Natural Law is divided into two branches, which it is important to distinguish one from the other; namely, Primary Natural Law, and Secondary Natural Law. The first is that which springs from the relation of man to man, without more, such as the rule that no man ought to kill or hurt another.

* Pand., lib. i., tit. i., L. 5.

The second is of a less simple nature. It arises out of some institution of which it is a consequence. So the Roman jurisconsult Paulus says, that theft is forbidden by Natural Law, and Ulpian says, that it is a thing naturally wrong.* Now this doctrine arises out of the institution of the law of property. That institution is grounded on Natural Law, because it is necessary for the welfare of society; and from it spring a variety of contracts and obligations, which are comprised in Secondary Natural Law. So the obligation of obeying the civil magistrate is a part of Secondary Natural Law.

I have said that Natural Law consists of principles of reason. This requires some explanation.

The duties of man are shown to him in three ways, and by three different authorities,—namely, first, the light of reason; second, civil laws; and third, revelation.† The first of these comprises the most general duty of man, especially that which tends to make him sociable. The second is the foundation of his duty as subject of a state. The third comprehends his duty as a Christian, considered as such.

Hence arise three sciences—Natural Law, common to all men; Civil or Municipal Law, which is or may be different in different states; and Moral

* Pand., lib. l., tit. xvi., L. 47.

† Pufendorf, Devoir de l'Homme, Preface, § 1, &c.

Theology, so called in contradistinction to Dogmatic Theology, which teaches doctrines and not duties. But the obligatory force of all these springs from one source—the Divine will.

When the jurists say that Natural Law consists of principles of reason, they do not mean to exclude the other two moral sciences above mentioned, for no doubt many things in Natural Law are confirmed and explained by Moral Theology, and even by Civil Law; but it is nevertheless necessary to distinguish those three sciences from each other, as they prescribe obedience to the duties which they comprehend on different principles, because the immediate authority from which they are derived is different, though in many instances their rules are similar.

Moral Theology is more extensive than Natural and Civil or Municipal Law, because the first of these two sciences chiefly, and the second exclusively, regards the external acts of men, while Moral Theology comprehends the exercise and cultivation of piety and other internal virtues, and the regulation of things which are not manifest to the exterior forum.

Ethics also are a science more extensive than Natural Law. Ethics comprehend the whole range of morality, and treat of all virtues and vices and the principles by which moral men are governed;

whereas Natural Law has regard chiefly to duties and rights, considered as a rule of external conduct for man, regarded as a social, responsible being, bound to maintain and procure, as far as in him lies, the welfare of society.*

We must next divide Natural Law into branches, with reference to the subjects to which it is applied. First, When it regards the relations of different sovereign communities with each other, it is called *external public law, or international law.* Secondly, When it regards the government of those communities within themselves, it is *internal public law.* Thirdly, When it regulates the rights of individuals, considered as such, and their transactions among themselves, it is *private law.* But, in the last two of these branches of law there is an admixture of arbitrary or positive law, deriving its force from the command of a human superior. And a considerable part of International Law is composed of treaties in the nature of contracts,—and usages which, however, are (as such) binding only in a somewhat qualified manner. The obligation of treaties is a part of secondary Natural Law, and international usages are in many instances founded on or arising out of Natural Law.

A plan has now been drawn showing how all laws bring out of Natural Law, from whence the connec-

* Pufendorf, Devoir de l'Homme, liv. i., ch. iii., § 9.

tion of the different branches of law with each other appears. They all have for basis that law *quod naturalis ratio inter omnes homines constituit;** that is to say, Natural Law, the will of the Creator revealed to us through our reason. It follows that the principles of justice which constitute Natural Law, and which it is the chief object of the science of jurisprudence to determine, must be a necessary part of all legal learning,—necessary for the full and profound and broad comprehension of every system of law, and useful to all who are concerned in the administration of the law and in legislation.

We will now proceed to Municipal Law, which is the chief subject to which in the performance of my duties I shall have to address myself.

"All nations," says Gajus, "who are regulated by law and by morals, are governed partly by their own laws, and partly by the law common to all men."† They are governed partly by positive or arbitrary and partly by Natural Law, which is confirmed and enforced by the civil power, and thus becomes a portion of the Civil or Municipal Law.

Gajus here gives us the great division of laws into two classes—Immutable Laws, and Arbitrary or Positive Laws. The nature of these classes and

* Pand., lib. i., tit. i., L. 9.

† Ibid.

their relation with each other, must now be considered.*

These immutable or natural laws are defined by Domat, the great French civilian, to be such as are necessary consequences of the two fundamental laws—*love of God and of our neighbour*—and which are so essential to the engagements which form the order of society, that it is impossible to alter them without injury to the foundations of that order. The other class—*Arbitrary Laws*, are those which may be differently established, changed, and even quite abolished, without violating the spirit and intent of the fundamental laws, and without injuring the principles of the order of society.

It appears from this first idea of immutable or natural laws that they derive their origin from the two prime laws of which they are an extension, and that the rules of equity are what the spirit of the second law demands in every engagement, and what it points out to be essential and necessary.

The origin of Arbitrary Laws requires to be explained somewhat more in detail. Two different causes have rendered the use of them necessary, and are the source of that great multitude of arbitrary or positive laws which we see in the world. The first of these causes is the necessity of regulat-

* Domat, Loix Civ.; Traité des Loix.

ing certain difficulties which arise in the application of the immutable laws, when those difficulties must indeed be provided against by law; but the immutable laws do not regulate them. A few examples will render this clear.

For a first example of the necessity of Arbitrary Laws, it is a natural and immutable law that persons, who have not yet attained a sufficient use of their reason and knowledge of things for want of age, should not have the uncontrolled management of their estates and affairs. But there is no natural law appointing *at what age* men attain that capacity which a man ought to have before he is intrusted with the exercise of his full power over his property. Yet some general rule, applicable to all men subject to the legislature of the particular country, is requisite to prevent endless difficulty and uncertainty. It has been found necessary to do this by an arbitrary or positive law, which determines the age of majority. That law differs in different countries, and may be altered as the interests of the community may require.

Thus it is a natural and immutable law that a widow, not having any means of her own, should have some provision out of the estate of her deceased husband. But there is no Natural Law defining what that provision shall be, nor how it is to be determined. This has therefore been done

by an Arbitrary Law, which defines by a general rule what the dower of widows shall be.

Thus, for another example, it is a natural and immutable law, that he who is the owner of a thing should continue to have the property of it, until he has divested himself of it voluntarily, or he be divested of it in some just and legal way. It is likewise another natural and immutable law, that possessors ought not always to be in danger of being molested in their possession by claims for ever; and that he who has been in possession of a thing for a long time should be looked upon as the owner of it: because men are naturally careful not to abandon to others what belongs to themselves, and because we ought not to presume without proof that a possessor is an usurper.

If we extend too far the first of these two laws, which declares that the owner of a thing cannot be deprived of it but by legal titles and conveyances, it will follow that whoever can show that either himself, or they from whom he derives his right, have been owners of an estate, though they have been out of possession of it for centuries, will be restored to the estate and turn out the possessor, unless, together with his long possession, he can show a title which has taken away the right of the first owner. And if, on the contrary, we extend too far the rule which makes it be presumed that possessors are

owners of what they possess, we shall do injustice by taking away the property from all who are not in possession.

The contradiction to which these two laws might lead us—one of them restoring the first owner against an ancient possessor, and the other maintaining a new possessor against the right owner—required regulation by an arbitrary law, that they who are not in possession and who, notwithstanding, claim the right of property, should be bound to assert and prove their right within a certain time; and that after that time the possessors who had not been molested in their possession should be maintained in it. This has been done by the arbitrary laws called Statutes of Limitations.

All such arbitrary laws, which are consequences of immutable laws, have two characters which it is important to distinguish, and which make them two laws in one. For in these laws there is one part of what they ordain, which is of the law of nature, and there is another part which is arbitrary. Thus, for instance,—in the Law of Dower two dispositions are included; one that widows shall have some provision for their maintenance out of their husbands' estates, and the other which defines what that provision shall be. The first is a natural and the other a positive or arbitrary law.

The second cause of the arbitrary laws was the

invention of certain artificial institutions and usages, which were intended for the benefit of society. Such are feudal tenures, primogeniture, gavelkind, entails, settlements, the distinctions between legal and equitable estates, and other things, the establishment of which was arbitrary. And these matters, which are the invention of man, and which may therefore be termed *arbitrary matters*, are regulated by a vast number of laws and rules of law of the same nature.

Thus we find in society (as Domat judiciously observes) the use of two different sorts of matters which are the objects of law. Some are so natural and so essential to our common wants that they have been always in use in all places; such as exchange, letting and hiring, the contract of loan, guardianships, and other covenants and matters. Some, on the other hand, are artificial and invented, and confined to particular places or countries. But even these matters which men have invented have, or ought to have, and profess to have their foundation in some principle of the order of society in general, or of the particular society in which they prevail.

It is to be observed also with regard to these arbitrary matters, that though it would seem that they must be regulated entirely by arbitrary laws, yet there are many natural laws relating to them.

Thus in the arbitrary matter of settlements it is provided that a voluntary settlement shall not be good against creditors. So in the arbitrary matter of the Law of Estates it is provided that tenant for life or his representatives shall not be prejudiced by any sudden determination of his estate. Therefore, if a tenant for his own life sow the land, and die before harvest, his executors shall have the emblements or profits of the crop. This is natural justice to the tenant and to the commonwealth; and Lord Coke says, "Lest the ground should be immanured, which would be hurtful to the commonwealth, he shall reap the crop which he sowed in peace." *

This explanation of the nature of immutable and arbitrary laws gives us the first principles of all Municipal Law, both public and private; and those first principles are very important to be remembered, for they show how Municipal Law springs out of Natural Law, which is the foundation of all human laws, and thus indicates the place which Municipal Law holds in the great moral science of general jurisprudence. It is easy to infer also from the sketch of that science which I have presented to you, how every one of its branches bears an intimate relation to the others,—all being equally grounded on the great system of human society, founded by

* Co. Lit. 55 a.

the Divine Will, and resulting from the reasonable and responsible nature of man, and the condition in which he is placed on earth, whereby duties are cast upon him from which all legal obligations are derived.

The use of this comprehensive view of law and its branches, and the unity of their foundation, will easily suggest itself to a thoughtful mind. As it is important for the complete knowledge of any branch of natural physical science to be acquainted with the connexion of the physical sciences with each other, and the general laws of nature which pervade the whole creation, so it is difficult to attain a profound and masterly knowledge of any particular branch of jurisprudence—such as Municipal Law—without some notion of the great moral science to which it belongs, the connexion of the parts of that science, and the fundamental rules which constitute its unity.

The chief object of a lawyer no doubt is the knowledge of the laws of his country, considered as rules of conduct, deriving their authority from the supreme civil power. This is the work of *memory*. But a lawyer must also explain and reason upon those laws, and assist in improving them and framing new laws. For this part of his duty he must acquire more than the mere knowledge of Municipal Law. And here it is that the science of

general jurisprudence becomes necessary, to furnish comprehensive views of law and legislation—theories, arguments, and reasons of law; to show what principles should be extended and what restricted—what rules may be altered and what ought not to be touched, and to give the lawyer and the legislator a sort of framework in which he may place his ideas, and a scheme for the arrangement of the knowledge which he from day to day acquires. These objects I shall never lose sight of in the readings which, by the favour of the learned Masters of the Bench, I shall have the honour of delivering here. The recollections of this venerable place, and the memorials of great and illustrious advocates, judges, and statesmen by which we are surrounded, inspire me with a zeal for the performance of the duties intrusted to me by their successors, which may in some degree compensate for the absence of other qualifications.

This numerous attendance, and the presence of so many learned and eminent persons, would almost overwhelm me (conscious as I am of my own deficiencies), if I did not on the other hand feel encouraged by the reflection that those very circumstances show how highly any effort for the augmentation of legal knowledge is appreciated by those whose countenance and sympathy are most valuable.

And I am further encouraged, by the knowledge

that the materials out of which it will be my duty to construct my readings are such that my labours cannot be without *some* use: for it is impossible that the doctrines of the sages of the law, and the oracles of European jurisprudence, can be presented to a cultivated and intelligent mind without producing some valuable result.

SECOND READING.

ON THE USES OF THE ROMAN LAW, AND ITS RELATION TO THE COMMON LAW.

THE uses which we may derive from the science of general jurisprudence to improve the study of our own law, by furnishing us with a great and comprehensive view of law, and also with rules and doctrines founded on reason and justice, showing the grounds of Municipal Law, have been explained in my first reading.

I have shown that Municipal Law is but a branch of a great moral system, having a sort of unity and harmony in its parts which link them all together, so that the study of one must be assisted by a knowledge of the remainder, and of their relation to each other. A portion of this subject is still to be considered, which cannot be omitted without leaving what has been done very incomplete, and breaking the engagement into which I have entered, to bring before you such knowledge as must be useful for the more profound and scientific study of our own law.

I refer to the mass of learning contained in the

Corpus Juris and its commentators, and known as the Roman Law; which claims our attention for more than one reason. It has a character of universality which no other body of law possesses; for there is no part of the civilized world where in some form or other, and to a greater or lesser degree, it does not exist in a living state. And Lord Holt, in *Lane* v. *Cotton*, 12 Mod. 482, tells us that the laws of all nations are raised out of the ruins of the Roman Law, and that the principles of the English Law are borrowed from that system, and founded on the same reason. Lord Hale also said, that the true grounds and reasons of the law are so well delivered in the Pandects, that a man can never well understand law as a science without resorting to the Roman Law. To this character of universality another distinctive feature is added. There is no body of law that contains the rules of Natural Immutable Law in a purer state, to a greater extent, in a more systematic form, or less mixed with purely arbitrary laws.

Thus Pufendorf speaks of the *Corpus Juris* as the great collection of the Natural Law; and the Chancellor D'Aguesseau says that to the Roman jurisconsulti alone justice seemed to have revealed all her mysteries. It is therefore the foundation of the science of general jurisprudence.

These reasons are abundantly sufficient to show

that in our future labours we must not neglect the Roman Law; and they also, in my opinion, lead to the conclusion that some reflections on the historical relation of the Roman Law with our own law, and on its uses, will be a useful subject for this preliminary reading.

Notwithstanding the merit and value of the Civil Law as a most ancient and complete body of legislation, and as a system of written legal reason, we must admit that its decided defeat under King Edward I. by the Common Law, was a great national benefit. That defeat is one of the chief causes which led to the development of our mixed constitution, wherein the three elements of government—*monarchy*, *aristocracy*, and *democracy*, are so happily united and blended together as to form the most successful (I had almost said the *only* successful) constitutional government in the world.

The victory of the Common Law in a great degree tended to preserve that most valuable and vital part of our constitution—local liberties and local government, produced by the feudal ingrafted on the Saxon institutions. If the Civil Law had prevailed, the feudal and aristocratic part of our constitution would have been depressed before the popular part had come to its proper strength, and the monarchical part would have thus been unduly exalted.

The local government and local institutions of the Common Law would have given way to a Byzantine prerogative.

In saying this, I do not refer to the famous text in the Pandects, "*Quod principi placuit, legis habeat vigorem.*" That is a mere rule, defining one of the sources of the Roman Law. It is indeed curious that the text in question expressly rests the imperial prerogative on a supposed delegation of power to the emperor by the people. *Cum populus ei et in eum omne imperium suum et potestatem conferat.* The doctrine commonly known as that of divine right of kings is not a doctrine of the Civil Law ancient or modern. That doctrine was derived by analogy from the Jewish kings, and belongs not to the Roman emperor but to the kings of the barbarians. * The great civilian and theologian Suarez, (whose doctrines are most ably summed up by Mr. Hallam) (lib. iii., cap. iv., § 5), very judiciously lays it down that the political power of government, considered *in se*, is *juris divini*, but that the power vested in a particular man is *juris humani*: and that whether the government of a particular country be a monarchy or a republic, is matter of human institution. I refer to a different reason. If the

* Anaclet. Reiffenstael, Jus. Can., lib. i., tit. ii., p. 62. Allen on Royal Prerog. p. 23. And see Hallam, Literat. of Europe, vol. iii., p. 356.

Civil Law had obtained the ascendancy in this country, the administration of the law would have fallen entirely into the hands of *legists*, probably often foreigners—men from their birth and education averse to the Saxon and feudal institutions; and their decisions would have formed the Constitutional Law. They would have advised in Parliament and managed public affairs.

The profoundly scientific character of their system would have deprived both the Barons and the Commons of their full share in the business of the country. This took place in France, and the result is well worthy of examination.

Montesquieu * shows that the ascendancy of the Roman Law in France, after its revival in the school of Bologna, and the example of the Ecclesiastical Courts, gradually cast into disuse the administration of justice by the Peers and by the feudal Lords in their courts. Thus was lost the ancient usage to be seen in the Capitularies and the Salic Law, that justice was not administered by a Judge without the assistance of the Peers—the *judicium parium.*

The Civil Law was too scientific to admit of any persons not regularly trained in the schools sharing in its administration. France was divided into two portions—the *pays de droit écrit*, where the Roman

* Liv. xxviii., ch. xlii.

Law was the Common Law of the land; and the *pays coutumier*, where the Customary Law of the particular province prevailed. But even in the latter the Customary Law was expounded and interpreted by the Roman Law: and so in the rest of Europe both the *Liber Feudorum*, and the Municipal Feudal Law of each country were controlled by the doctrines of the Civil Law.

* The same causes induced St. Louis to summon civilians to the *Placita Conventa* of the kingdom to assist the Barons with their advice. But the Barons soon neglected to attend, because the law became too abstruse and artificial for all but the doctors who had gone through a legal education. The consequence of this was that the legists obtained from the crown the privilege of voting. Afterwards these assemblies, to which both civilians and nobles were summoned, were held more frequently in the king's palace, and acquired the name of Parliaments: and the summons of the civilians became permanent commissions or offices—whereby the management of affairs fell into their hands. These offices became, in practice, hereditary.

When the Parliament was thus composed, in great measure, of officers of the crown, it was made stationary at Paris, instead of following the king,

* St. Simon, Mémoires, vol. xxi., p. 172.

and it sat during the greater part of the year, the Peers almost entirely discontinuing their attendance. This was the assembly where the greatest matters were decided, and the highest acts of state performed, and it superseded the National Assembly of the Estates of the kingdom.

Thus a distinct class or order of legists—professed civilians and servants of the crown—was formed. The crown made use of them against the nobility; and sometimes relied on the nobility to check them: but the Parliament of Paris was always jealous of the nobility, and therefore ready to support the crown in every measure calculated to centralize authority and restrain local and feudal liberties and privileges.

You will remember, that Blackstone said, that if ever liberty were restored in France, it would be by means of the parliaments. They were indeed illustrious and venerable assemblies; but the causes, the rise and progress of which I have endeavoured to describe, rendered impossible what Blackstone foretold. The parliamentary men of France were a class too much insulated. They were not sufficiently independent of the crown. They were compelled to lean on the crown for support against the nobility. But even if that had not been so, they must have been too much separated, as a legal and official aristocracy, from the rest of the *tiers état* or commonalty to act with that order, or assist them

in developing political liberty. And by drawing into their own hands the whole administration of justice, the legists injured the political status of the rest of the community, and rendered them comparatively unfit for political power.

The history of the English law and constitution presents in these particulars a striking contrast to that of France. The Feudal and Saxon laws were the basis of the constitutional laws of England; and though the Civil Law exercised considerable influence over them, it never obtained the ascendancy. The consequence of this was, that the distinctive features of the National Law were preserved. It is true that the Common Law soon became complicated, and required considerable study to be known, so that it was chiefly administered by a body of lawyers making the law their profession. But still it was a system essentially national—requiring more experience and patience than scholarship and metaphysical acumen. Thus its administration never fell entirely into the hands of the legists. A great part of it was intrusted to persons not making law their profession—such as sheriffs, coroners, justices of the peace, and jurors. In the hands of such persons was and remained the government of the counties, cities, boroughs, and towns—the local character of which was thus preserved from the centralizing encroachments of the royal prerogative.

And the parliament was always principally composed of men who were not lawyers by profession, even the upper house, the supreme court of ultimate resort.

Thus, we find in Fortescue (c. 49), that the children of the important men of the kingdom—the knights and barons and grandees of the land—resorted to the inns of court to study the Common Law, for some knowledge of law was thought to be required of all persons of station, and many of that class devoted themselves to its study and practice as a profession. So there was no hostility between the professors of the Common Law and the nobility or the commons,—and indeed we find that from our profession a great part of the peers of the realm are sprung. For the same reason, the lawyers have never caused the barons to discontinue their service in parliament, and the peers show no jealousy of the judges, or of those who are usually called the *law* lords. Thus, we have in this country no *noblesse de robe*—no distinct legal aristocracy like that which existed in France.

In the House of Commons the opinion of the lawyer is listened to on all legal questions; but he is no more looked upon as belonging to a separate class or order in the community than a soldier or a sailor. And the practice of the law at every generation raises eminent persons to sit among the mag-

nates of the realm, by whom they are regarded as men rightfully entitled to be placed among the nobility, and bringing to that august assembly an accession of weight and power by their experience and the dignity of the great employments with which they have been invested.

This eminently national character of the law of England and its administration is a very important element in the development of our liberties, and may also be a cause of the stability of our institutions. The participation of a great proportion of the nation in the administration of justice is no doubt a means of rendering the nation fit for the exercise of political power, and this is a truth which has unfortunately been overlooked by the modern framers of constitutions on the continent. They have too much neglected the means of rendering the people fit to exercise power, and with a view to uniformity of plan and principles, they have neglected all those local institutions which are the elements out of which public liberty is formed.

These reflections were necessary to show us the political effect which the fate of the Civil Law in England has produced (with many other causes), upon the progressive formation of our laws and institutions.

We must now proceed to consider the uses to be derived from it. Chancellor Kent, the Blackstone

of America, has thus judiciously described the peculiar value of the Civil Law to us:

"The value of the Civil Law is not to be found in questions which relate to the connexion between the government and the people, or in provisions for personal security in criminal cases. In everything that concerns civil and political liberty, it cannot be compared with the free spirit of the English and American Common Law. But upon subjects relating to private rights and personal contracts, and the duties which flow from them, there is no system of law in which principles are investigated with more good sense, or declared and enforced with more accurate and impartial justice. I prefer the regulations of the Common Law upon the subject of the paternal and conjugal relations, but there are many subjects in which the Civil Law greatly excels. The rights and duties of tutors and guardians are regulated by just and wise principles. The rights of absolute and usufructuary property, and the various ways by which property may be acquired, enlarged, transferred, and lost, and the incidents and accommodations which belong to property, are admirably discussed in the Roman Law, and the most refined and equitable distinctions are established and vindicated. Trusts are settled and pursued through all their numerous modifications and complicated details, in the most rational and

equitable manner. So the rights and duties flowing from personal contracts, express and implied, and under the infinite variety of shapes which they assume in the business and commerce of life, are defined and illustrated with a clearness and brevity without example. In all these respects, and in many others which the limits of the present discussion will not permit me to examine, the Civil Law shows the proofs of the greatest cultivation and refinement; and no one who peruses it can well avoid the conviction, that it has been the fruitful source of those comprehensive views and solid principles which have been applied to elevate and adorn the jurisprudence of modern nations."*

The learned commentator here very correctly points out the true merits of the Roman Law. Let us see how they are to be made available to our purpose.

In the first place, the Roman jurisprudence ought to be studied as a system,—as a science which cannot be usefully comprehended unless regard be had to the bearing of one part on the other. Unless this be kept in mind, the use of insulated texts of the law will only mislead, or be of little service.

This is so with regard to the University, Ecclesiastical, and Maritime Courts, where the Civil

* Kent, Comm., vol. i., pp. 546, 547.

Law, so far as it is admitted into use, has a legal authority,—but in our own law, the Civil Law is in general to be used only as written reason,—and the opinion of the learned. Of this we have an instance in the case of *Ryall* v. *Bowles*, 1 Ves. sen. 370, and 1 Atk. 181, where Lord Chief Justice Lee, sitting with Lord Hardwicke, said, "Though no judicial determination, yet I may cite a Civil Law authority concerning partnership, though not an authority on which a judgment is to be founded in our courts; yet, as is said by Lord Raymond, may be used as the opinions of learned men." And so, in the same case, Mr. Justice Burnet cites the Roman Law with regard to pawns. And in *Acton* v. *Blundell*, 12 Mees. and Wels. 353, Tindal, C. J., said, "The Roman Law forms no rule binding in itself upon the subjects of these realms; but in deciding a case upon principle where no direct authority can be cited in our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law,—the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the Municipal Law of most of the countries of Europe." Many other cases, such for instance as that of *Coggs* v. *Barnard*, might be cited where the judges have made great use of the written reason of the Roman Law.

Now it is clear that such authorities will have weight with our courts only so far as they are grounded—not on the positive Law of Rome—but on sound legal reason and equity. And without a comprehensive knowledge of the law, it is difficult to distinguish what principles are purely equitable, and what partake of the character of arbitrary law, and appertain to the positive institutions and legal rules of the Romans. This distinction is noticed by Lord Loughborough, in the case of *Stackpole* v. *Beaumont*, 3 Ves. jun. 96.

An instance of the danger of using insulated texts of the Civil Law *pro re nata*, without regard to other portions of the law explaining them, is to be found in the case of *Kennett* v. *Abbot*, 4 Ves. jun. 808.

In that case Lord Alvanly, M. R., cited this passage of the Digest:—" Falsam causam legato non obesse verius est, quia causa legandi legato non cohæret. Sed plerumque doli exceptio locum habebit si probetur alias non legaturus fuisse." This law his lordship interprets thus:

"The meaning is that a false reason given to a legacy is not of itself sufficient to destroy it: *but there must be an exception of any fraud practised*, from which it may be presumed the person giving the legacy would not, if that fraud had been known to him, have given it." Now, *exceptio doli* does

not mean an exception of any fraud practised. It is a technical name of a plea denying the equity of the plaintiff's demand. Thus the text of law in question does not refer to any fraud practised, nor to the testator's ignorance of that fraud. It simply means that if it be proved that the testator would not have given the legacy had he been aware of the falseness of the supposed fact which he stated as his reason for giving it, then the plea called *exceptio doli* would be allowed, and the legatee would fail. You see, therefore, that in this case the sense of the authority cited was lost, because the judge did not look beyond the particular text which was cited by counsel. The spirit and sense of the law is, that where the error of the testator is not shown to be essential, it may be presumed that the testator would not have withheld his bounty if he had been acquainted with the truth, and a like principle has been followed in the English Law.

To use even the purely equitable rules of the Roman Law with full advantage, that system of jurisprudence must be studied as a whole, and in a comprehensive manner, that they may be applied according to their true spirit. This is beautifully shown by a passage in Domat. It is necessary, says that great writer, to be careful, lest under the pretext of preferring natural to arbitrary laws, you extend a natural law beyond the just limits drawn

by an arbitrary law, whereby it is rendered consistent with another natural law, and which gives to each its true effect, and lest you thereby wound that other natural law, while you think that you are dealing only with an arbitrary law. Thus, for instance, it is a natural law, that he who has caused any damage to another must repair and make amends for it. But if so great an extension were given to this law as to oblige the debtor who has not paid a simple debt at the time when it was due to repair all the loss which his creditor has suffered by the default of payment,—as, for instance, if his goods were taken in execution and sold, or his house had fallen into ruin because he had not the means to repair it,—such an application of that law, itself just and natural, would be unjust. It would wound an arbitrary law which defines and limits the damages which a debtor must pay, to that remuneration called *interest*. By wounding that arbitrary law, two natural laws on which it is founded would be violated,—one which does not allow men to be liable for unforeseen circumstances which are more of the nature of fortuitous events than consequences reasonably imputable to them, and the other which requires that the infinite variety of losses and damages which different creditors may suffer by default of their debtors should be regulated on one uniform system of compensa-

tion common to all causes arising from the same cause,—that is to say, the non-payment of a debt, —without distinguishing between the events which immediately cause those different damages. Their diversity arises from the difference of events which so far as the debtor is concerned are fortuitous, for which he ought not to be made answerable, and which would be the causes of an infinite amount of litigation.

This passage shows very clearly the care with which rules of equity must be applied, and that this cannot be usefully done without a knowledge of the system of which they form part, and that if a rule of equity be used by itself, there will be danger of violating other equitable rules whereby it is limited. Thus we find the Pandects say,—*Omnis definitio in Jure Civili periculosa est.* And Paulus goes so far as to lay it down that—*Regula est quæ rem quæ est breviter enarrat. Non ut ex regula jus sumatur, sed ex jure quod est regula fiat*;—that is to say, a rule is not intended to make the law, but it is made *from* the law and expresses it in a brief form; whence it follows that to make use of the rule, the law must be known to which the rule belongs.

These observations must be kept in mind by whoever wishes to make a good use of the Pandects, which contain a great multitude of rules and maxims,

the value of which is so great that the Chancellor D'Aguesseau says, "It is impossible to fill your mind too much with those rules which are so many oracles of jurisprudence and the *précis* of all the thought of the jurists." And our own law supports the opinion of the French Chancellor. A great number of these rules, taken from the Civil Law, are used by Lord Coke in his famous Commentary; such, for instance—*Id certum est quod certum* reddi potest:* *Ut res magis valeat quam pereat*: † *Quod semel meum est amplius meum esse non potest*: ‡ *Quando lex aliquid concedit, concedere videtur et id sine quo res ipsa* esse not potest: § *Non quod dictum est sed quod factum est inspicitur*, ‖ and many others. All of which are common rules and maxims of the civilians. And a great many cases, such as *Moon* v. *Durden*, 2 Wels. Hurlst. & Gordon, may be cited, where these and other such Civil Law rules have been used by the judges.¶

We will now take a brief view of the books which contain the Roman Law, and which constitute the Corpus Juris. They are—The Institutes; The Digest, or Pandects; The Code; and The Novels, or Novel Constitutions.

The Institutes were drawn up by three Commis-

* Co. Litt. 45 b, 52 b. † Ib. 49 b.
‡ Ib. 49 b. § Ib. 56 a. ‖ Ib. 36 a.
¶ Ram, Science of Legal Judgment, p. 15, chap. 2.

sioners, Trebonian, Theophilus and Dorotheus, and were published as law by the Emperor Justinian, in December, A. D. 533. This is a very little work compiled on the model of the Institutes of Cajus or Gajus, and divided into four books, which gave occasion to a whimsical conceit of Accursius the Glossator, who attributed this division to analogy with the four elements, saying—that as the body was nourished by the four elements, so the mind was by the four books of Justinian. But the more important division of the matters contained in the Institutes is the celebrated classification of law under three heads,—namely, *persons—things*—and *actions*. The first book treats of persons, after two preliminary titles on law; the second, the third, and the first five titles of the fourth regard things, —and from the sixth to the last title of that book the law of actions is explained.

Blackstone has followed this arrangement in his Commentaries; and though it has been very ingeniously attacked by Mr. Serjeant Stephen, I believe it will be found to be on the whole the most reasonable and scientific. Without entering into a discussion, which would exceed our limits, I must say that this reason seems to me conclusive. All law regards the legal capacity and incapacity of persons, which constitute what is called their status, —or the rights of persons with regard to things,—

or the remedies provided for enforcing the law, "Omne jus quo utimur vel ad personas pertinet, *vel ad res, vel ad actiones.*" This is a distribution of laws with reference to their objects. Law is administered *to persons,—regarding things,*—and by *means of actions or judicial proceeding.* It follows that the law ought first to classify persons with regard to their capacity and incapacity of rights and obligations, which is called the *status* of persons; and then to enter into the subject of those rights and obligations;—and subsequently to show the remedies for their enforcement and protection, which are amongst the principal objects of human society and government.

You will find the same principles of arrangement applied to criminal law in Lord Hale's Pleas of the Crown. They are observed in the Canon Law and in the Code Napoleon.

In the first part of the Institutes, where the status of persons is shown with reference to their natural and social circumstances, there is much that belongs exclusively to the customs of the Romans, but it contains the foundations of the Law of Status. The second part is more interesting to an English lawyer, for it teaches the elements of the law of property, as well as of the legal rights which have not property for their direct object. The third shows many principles and forms on

which the administration of justice in all countries is constructed in a greater or less degree, and it includes the remedies called public actions, which seek to protect legal rights by the punishment of offenders.

We will proceed now to the Pandects, or Digest. This great work, prepared by Trebonian, with sixteen of the greatest judges and advocates of the time, was published as law by Justinian in January, 533, and it is the most important part of the Corpus Juris. It contains—condensed into fifty books—the most valuable portions of the writings of the ancient sages of the law, extracted from two thousand volumes, and consisting of a hundred and fifty thousand verses or paragraphs. Each of the fifty books contains several titles, which are again divided into laws; and those laws are, in general, divided into parts, the first of which is called *Principium*, and the others paragraphs.

The general arrangement of this great compilation is modelled upon the perpetual edict of the Emperor Hadrian; but it has been the subject of severe and well-founded criticism. Pothier and Donellus have * justly blamed Trebonian and his colleagues for not adopting a more simple and lucid order in their work. Cujacius somewhat warmly

* Pothier, Præf. ad Pandect., capt. De Vitiis Pandect.; Donelli Comment., lib. i., tit. i.

resents the strictures of Hotman, but the learned are, I believe, agreed that the method of the Pandects is very defective. And it is remarkable that Cujacius himself (the greatest of all commentators), instead of following the order of books and titles of the Digest, endeavoured to assemble together the scattered fragments of the legal writings of which it is composed. Thus, as the skilful and zealous artist collects and curiously joins together the broken pieces of some ancient statue, presenting to the admiration of the world, if not all its fair proportions, at least a semblance of its ancient beauty and majesty,—he brings before us, not the chequered work of Trebonian, but the Roman jurisconsulti themselves; the severe and oracular dignity of Papinian and Africanus; the lucid dialectics of Ulpian; the acuteness of Paulus; and the classic beauty of Gajus. Every fragment is separately commented upon and explained by Cujacius, with an erudition and legal acumen unsurpassed, perhaps unequalled, by any commentator, ancient or modern.

The most valuable attempt to rearrange the Pandects was made by the great Pothier. But unfortunately he was not bold enough to overcome the prejudices of the learned. He did not, in his celebrated work, called *Pandectæ Justinianæ*, change the order of the books and titles of Tre-

bonian; but he most skilfully arranged the different laws in each title, adding those in the other portions of the Corpus Juris, and thus forming a sort of Concordance of the texts of the Roman Law. The system of Cujacius shows the true meaning of the Roman jurists; that of Pothier brings within a small compass all the laws relating to the same subject.

The Cujacian method proves that science has greatly to lament the loss of the complete works of the jurists which existed in the reign of Justinian; but there is no sufficient reason to impute that misfortune to the author of the Corpus Juris. Their destruction probably arose from the disuse into which they fell after their most valuable portions were collected together and invested with legal authority; and Justinian is as guiltless of the loss of Papinian, Ulpian, and Gajus, as the monks of the middle ages are now proved by Cardinal Mai to have been of that of the classic writers of antiquity.

There are few titles in the Pandects that do not contain rules of great value to every lawyer, whatever may be his country and the law which he professes; but it may be useful to point out those which most concern ourselves.

The first four titles of the First Book give a

description of Justice—of Law—of the History of the Roman Law, and its different sources. They are the elements of Jurisprudence and the Civil Law. The eighth title gives the classification of things. Some are *Divini Juris*—or dedicated to Religion—and others are *Humani Juris*. Some are by Natural Law common to all men, and others public. Some belong to corporate bodies; some to no one; some to individuals. Some things are corporeal; others incorporeal. This title contains the fundamental principles of the laws of things. The 17th, 18th, 19th, 20th, and 21st Books contain the laws of the most important contracts, on which our own Law of Contracts is founded. The 26th and 27th Books regard guardianship, and contain many rules which are useful to a Chancery Lawyer.

But, perhaps, the most practically important part of the Pandects to the English Lawyer is that which relates to testamentary dispositions; for where the Civil Law is admitted in the Ecclesiastical Courts, there the Temporal Courts are in general guided by the same law, that there may be uniformity of judgments in the different Courts. This part of the Pandects, commencing with the 28th Book; but especially the Three Books—30, 31, and 32—which contain an extraordinary number of

rules for the interpretation of wills, and the 33rd and 34th Books relating to bequests of particular things,—are well worthy of attentive perusal, as they are full of rules which no judge would treat with neglect. And the first title of the 35th Book, entitled, *De Conditionibus et Demonstrationibus*, which is chiefly intended to show the distinction between conditions, and descriptions of legatees, is also of great practical use. It should be read with the 7th title of the 28th Book, intituled, *De Conditionibus Institutionum*, which treats of Conditional Appointments of Heirs.

The titles 1st and 2nd of the 41st Book—which show the modes of acquiring property, and of acquiring and losing possession, are of the highest interest and use, as well as the remainder of that book which treats of acquisition by user—and of different titles of possession.

The 24th and 25th Books complete the Law of Contracts, and the 26th contains that of Sureties and the extinction of obligations. Such are the most essential portions of the Pandects.

We come now to the third part of the *Corpus Juris*,—namely, the Code.

In the third year of Justinian's reign, he promulgated his first Code, containing his Constitutions and those of his predecessors. Fifty important points on which the ancient Roman jurists differed,

UNIVERSITY LIBRARY

This book must be returned on
or before the last stamped below

Bowyer, George
Two readings delivered i

NAME	DATE

d in the
w Library
44 066 046

STANFORD UNIVERSITY LIBRARY

To avoid fine, this book should be returned on
or before the date last stamped below

Robert Crown Law Library
Stanford University
Stanford, CA 94305-8612

AV ABR XYL
Two readings delivered in the
Stanford Law Library
3 6105 044 066 046

Bowyer, George
Two readings delivered

NAME	DATE